85-2103

No._____

Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term 1985

UTILITY CONTRACTORS, INC.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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1. Is the Government liable to a onstruction contractor upon re-completion water discharge damage to roject concrete channel lining, caused by he Government's design for transition ection and filter material when the overnment's own designers did not foresee heir effect ?

2. Can Congress constitutionally reate an Article I legislative court as rial court of a breach-of-Government ontract claim and transfer Petitioner's ase there from an Article III Court, in iew of the case's nature as an inherently udicial matter historically cognizable in rticle III courts?*

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*The parties involved in the roceeding sought to be reviewed are olely those appearing in the caption of his case in this Court. Martin K. Eby o. is an affiliate of Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Utility Contractors, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on January 21, 1986, and denied rehearing on March 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (CAFC), unreported, denying rehearing/rehearing en banc appears herein as Appendix "A". The opinion of the United States Claims Court,

published at 8 Cl. Ct. 42, on which the Court of Appeals based its opinion, appears herein as Appendix "B". The opinion of CAFC, unreported, affirming (and adopting as basis) the United States Claims Court opinion Appendix "C".

JURISDICTION

The judgment of the court of Appeals for the Federal Circuit (CAFC) was entered on January 21, 1986. The timely request for rehearing and suggestion for rehearing en banc was denied March 19, 1986. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked per 28 U.S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const. Art. III, Secs. I and II; Tucker Act, 28 U.S.C. Sec. 1491 (1970) as amended (Supp. 1978); Contract Disputes Act of 1978 ("CDA"), 41 U.S.C. Sec. 609(a) (Supp.II, 1978); Pub. L. 95-563, 92 Stat. Sec. 16, 2391. Federal Court Improvement Act of 1982 ("FCIA"), Pub. L. 97-164, Title I, Sec. 133(a), 96 Stat, 39 Sec. 161(10), 96 Stat. 49, and Sec. 402,403(d), 96 Stat. 57; 28 U.S.C. Sec. 171, 172 and 173.

STATEMENT OF THE CASE

1. General

Utility Contractors, Inc. ("Utility") incurred increased costs of performance (at least $590,000) in removing and replacing large spans of damage (in June-July 1979) to concrete, placed according to specifications, in an

above-$6 million rip rap and concrete channel-lining project for the U.S. Army Corps of Engineers, Tulsa District, on Joe Creek in Tulsa, Oklahoma. Utility sought recovery for breach of implied warranty of design, misrepresentation and non-disclosure regarding the Government's specifications for placing the concrete -- and on other theories (mainly mistake-interpretation of express reimbursement provisions) recharacterizing the aforesaid, which Utility does not pursue herein.

On April 22, 1985, the U.S. Claims Court issued its opinion published at 8 Cl. Ct. 42, granting the Government's Motion for Summary Judgment. Although the opinion omits the bulk of Utility's evidence and authorities, it does not mask the true factors (and thus overrules major cases) and is self-contradictory. The

opinion holds as bases (a) the contract provisions placed responsibility on the contractor for the damage, (b) the parol evidence rule (nevertheless considering extrinsic evidence in grounds (c)-(f)), (c) the specifications are not design-type but rather performance-type by allowing for more than method of performance, (d) the Government has no warranty on results prior to completion, (e) in contrast to Ordnance Research v. United States, 609 F.2d 462 (Ct. Cl. 1979) the contract specifies no method to prevent the damage and (f) the contractor should have foreseen the problem (although the Government itself did not) by obtaining consultants, as the Government need not furnish such information.

Utility timely filed its Complaint in the U.S. Court of Claims in August 1982. Under the pre-Oct. 1982 rules of such

court trial on the merits was before a magistrate/hearing officer, whose advisory opinion (and a verbatim transcription of the entire proceeding) was reviewed by a panel of three U.S. Court of Claims judges which made decision and entered final judgment. U.S. Court of Claims Rules 7-14, 122 and 134. The Federal Courts Improvement Act ("FCIA"),P.L. 97-164, removed this case from such Article III trial-court treatment as of Oct. 1982, transferring it to the Article I U.S. Claims Court, and deprived Utility of a much better hearing of its case.

2. Statement of Facts

Robert Kuhn, Utility's Area Manager for Tulsa since 1976, testifies to undergraduate education, training and over ten years career experience, all in the field of public-contract heavy construction. (84) He participated in

framing Utility's bid and was in charge of Utility's entire performance on the contract. Kuhn testifies that in June-July 1979, three heavy rainfalls caused floods which overtopped cofferdams, washing the fine-graded filter material out from under exposed edges of concrete and damaging the unsupported concrete in various ways. 1/ (92, 117, 118, 121) The losses of concrete at and below (and (as discussed below) directly caused by) the transition-section were over 80% of the damage to concrete. (93, 99-102). Weldon Gamel, the Tulsa District's Chief of Engineering, testifies directly the damage to concrete was not caused by negligence

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1/ References to record are to pages in Appellant's Appendix in CAFC, except that reference to "Plaintiff's Exhibit __" ("PX-__") is a reference to the original record in the U.S. Claims Court.

by Utility-which was awarded a 33-day extension to replace it. (302, 335, 97, 136)

The project was a procurement by advertised competitive bidding, for contract with schedule of fixed, unit prices. The contract specifications for placing concrete and fine-graded filter material in a subdrainage system were detailed, prescribing character, dimensions and location of work. (190-229) The contract provided for a transition-section in the concrete project portion downstream of the 61st Street Bridge, obliquely lowering the channel nine feet vertically in a ten-foot horizontal span. (85, 161, 231 (Drawing); see 159) Robert Kuhn testifies that (i) on any given aspect, there were just three or four standard available construction procedures, and (ii) the Corps had the

right to direct the contractor's choice of procedures and reviewed-approved Utility's required plans of operations, concerning its procedures and (iii) thus, Utility was using the methods he infers the Corps expected it to use. (87, 39-40, 176-189)

In their week-long effort in framing bid, Utility's personnel examined the contract, specifications and plans closely, and saw no design errors. On the plans, the transition-section was a minute portion of a 2-1/2 mile span. (87, 231) To Utility's personnel, the designer's name and Corps emblem which appeared on the Joe Creek plans (similar to on all plans), along with notes and directions, represented that the Joe Creek project was economically constructible. (88, 231) They were also aware that by industry standards, the cost of engineering design of such a project was in the range of 5%

of contract price, and that the cost of the Government's supervisory effort during construction would be in the same range. (88) The contract did not mention (and from the beginning, not one Corps representative ever mentioned even considering) the possibility of losses of concrete. (88) Utility's personnel also considered the Government's implied warranty of its design extended to precompletion water damage to concrete. (88)

Utility's personnel were experienced in concrete channel-lining work (having completed two other major projects) and also in other public-contract heavy construction projects utilizing concrete in the permanent structure. (85-88) (Defendant's Answer, paragraph 5, admits that Utility did a good job in performing the project, and maintained good relations

with Defendant's representatives throughout.) (47) Robert Kuhn testifies that in such projects there are no losses of properly-placed concrete in the permanent structure (with the exception of some minor, foreseeable losses). (85-89) Utility thus expected that upon rainfalls, channel flows would exceed cofferdams and Utility's pumping diversion system and--without damaging concrete--would damage cofferdams and preparatory work prior to placement of concrete, for which Utility included $60,000 in its bid. (88)

Utility further expected that if the Government had expected more than minimal losses of concrete, then the Government would have included in the specifications safeguards--which they knew existed--to prevent such losses. Robert Kuhn testifies that no information on

omissions--or disclaimers--appeared in the contract. (86) Thus, Utility did not expect--and did not even contemplate including an element in its bid for--more than minimal losses of concrete or (including per its prior experience) having to improvise measures to prevent such losses of concrete. (85-89) Utility's costs of removing and replacing the losses of concrete in fact exceeded $590,000, (with profit but before interest) and its loss exceeded $800,000 on the contract. (98-104)

M.S. Mitchell, Utility's designer-consultant (retained after the June-July 1979 losses) was a supervisor for 20 years of the entire Wichita Valley Flood control project, designing numerous projects, including the concrete-lined Wichita drainage canal conversion, which was in joint venture with the Army Corps

of Engineers. (141, 142)

The causes of the losses of concrete are founded in the technical areas of hydrology and hydraulics--with which (i) Mitchell testifies contractors are not familiar, and (ii) Weldon Gamel testifies contractors are familiar "to some extent", but in which the balance of knowledge is on the side of the Government. (159, 309) Corps designers are vastly experienced experts in such areas. (150; 50) The Government's cost of its design effort on the Joe Creek basin was $406,331.74, of which twenty percent was on the subdrainage system. (56; 311)

Weldon Gamel also testifies that contractors do not (and are not expected to) (i) function as designers or engineers, or (ii) retain consultants to analyze or criticize the Government's design specifications or (iii) redesign

the work under a contract. (309, 310) (See also 87, 144)

M.S. Mitchell testifies that the design engineers who designed the transition section were in the best position on both sides--Corps and contractor--to see the likelihood of losses of concrete in the transition section area. (160)

Thomas Horner designed the transition section. (251, 252) He is a graduate engineer, with almost 20 years in the Tulsa District's hydraulic design section, of which he is the chief. (249, 250) He has designed in recent years (i) concrete spillways in nine Tulsa District dams and (ii) seven navigation systems. He and another experienced hydraulic design engineer spent in the area of a man-year between them, on the Joe Creek project hydraulic design, which he termed a

technical matter. (366, 279, 280, 253, 254) He explained in detail reasons for the transition section. (256-259) He and his staff studied water velocities in the completed project, but not in small flows over the transition section during construction and did not expect more than minimal losses of concrete from channel flows during construction. (260, 261, 263, 264, 270, 271, 281, 295-298) Accordingly, they also made no consideration of (i) inserting safeguards to prevent losses of concrete or (ii) whether the contractor might use measures to prevent losses of concrete. (265-267) He and his staff did not expect the contractor to include a pricing factor in its bid for such measures. (268) Horner testified that if they had determined pre-completion losses of concrete could occur, "...Some studies or design effort

would have been made with regard to minimizing that.." (277, 269)

Other than in the Joe Creek project, Horner knows of no losses of concrete during construction in public-contract channel projects. (255, 281, 282).

Weldon Gamel was the Tulsa District's Chief of Engineering when it generated the contract design, which he ultimately approved. (302-304) He knew "of no special analysis (during the design phase) on the likelihood of damage to the transition area (concrete)". (317, 318) In the design phase he did not consider (i) the comparative likelihood of damage to concrete in the transition-section area, versus the rest of the span (328) and (ii) whether a gradually sloping channel would have resulted in a smaller likelihood of losses of concrete. (320, 321) He now considered the hazard in the

transition-section area greater than elsewhere and (after reviewing his prior testimony) termed his non-consideration of such comparison in the design phase "...what I did, not what I should have done. (emphasis supplied" (329)

If Horner and Gamel thought they had more information of the likelihood of the losses of concrete than the contractor, they would have put it in the contract (268, 300; 330). If they had a design for, e.g., cut off walls, to prevent the losses, then, they would also have given that information to the contractor. (285, 331, 332) When the damage arose, the Government considered changing the design (336).

There are no Tulsa District records considering, in the design phase (i) the likelihood and causes of pre-completion losses of concrete and (ii) inserting

design safeguards to prevent such losses. (146-148; 242-244; 301, 315-326) Mitchell testifies that if Corps designers had expected any such losses of concrete there would be extensive consideration of inserting safeguards to prevent losses of concrete, with accompanying written records. (149) On each of two bases (to wit: (i) this absence of records and (ii) his study of project-design features (i.e., that the design specifications neither provide for placement of measures to prevent wash-out of filter material from under concrete nor even mention such measures)) he testifies to opinions that the Corps' intent (and expectation) in the design features of the project was (a) that there would be no (or only minimal) pre-completion losses of concrete, and (b) that a contractor not attempt to implement measures to prevent concrete losses.

(145, 147-149)

In addition, Eugene Shirley of R.R. Tway, Inc. testifies during his company's bid protest on the August 1977 Invitation for Bids ("IFB") on the project, the Government's representatives' discussion with him embodied the concept there would be no pre-completion losses of concrete on the project. (163-165) The Government's records of this bid protest contain no mention of any such losses. This protest was well-framed (resulting in the Corps raising its cost estimate by $479,237) and centered on areas of project engineering and water divsersion. (164; 352-354; 397-403; 405-415; 148) In bidding on both the August 1977 IFB and the December 1977 IFB on the project, Shirley expected (i) to suffer no losses of concrete (and included in Tway's bids no elements/pricing factors for such damage)

(163) and (ii) not to have to implement measures to prevent any such loss.

J.O. Stone, the Tulsa District Chief, Estimate section, testified directly there was no pricing factor for any pre-completion losses of concrete in the Government's cost estimate for the August 1977 IFB or December 1977 IFB. (376-378)

Dennis Garrigues testifies that at the pre-bid conference, when a contractor actually asked a question about pre-completion losses of concrete, the Government did not answer that any such losses of concrete could occur, or mention the transition-section, filter material, or measures to prevent losses. (233, 234)

Further indicating their surprise, a large number of Tulsa District representatives designers personally examined (and took 284 photos of) the three large losses and removal-replacement

work. (96, 93; 241-244)

From his observation of the damage to concrete, Robert Kuhn testifies it was caused by the transition-section (and its increased water velocity and turbulence) and the fine-graded filter material. (92, 93) He testified that after the transition-section area, the job went smoothly, except for two small concrete losses in May-June 1980. (97).

The Corp's own highly authoritative HEC-2 computer program indicates that in all low flows, the transition section increased velocities by 3, 2-1/2 or 2 times, to extreme velocities. (238, 239; 161, 162) Mitchell testifies it is velocity of water flows that cause their destructive force, by the natural law f=mv. (163) Corps designers studied water velocities in the project design flood, i.e., the 100-year frequency flood, not

low flows, and did not spot the unique high velocities below the transition section in low flows, which greatly exceeded velocities elsewhere in the channel of peak floods, i.e. including the 100-year flood. (260-261; 267; 365) Mitchell testifies that the transition-section feature does not appear either in nature or in other man-made channel projects. In both, gradually sloped channels or vertical drops accomplish changes in channel elevation, without generating such water velocity and turbulence downstream of their bases. (146, 143)

Mitchell testifies that the losses of concrete were caused by

> (i) the transition-section design (i.e., instead of a gradually-inclined channel or vertical drop structure, which would have prevented losses at and below the transition section),
>
> (ii) the fine-graded filter blanket (i.e., instead of a single layer

> coarse-graded filter material or a two part filter material and (coarse-graded) drain-material system which would have prevented the losses entirely) and
>
> (iii) (in the context of (i) and (ii)) the absence of design specifications for (a) placement and removal of filtercloth or fiberglass (impregnated with asphalt) graded rip rap, or gabions at exposed edges of concrete (which would have prevented losses entirely), or (b) sheet pile cut-off walls, at intervals, to remain in the structure (which would have prevented losses downstream of such walls). (143, 144)

Weldon Gamel does not deny such causation in such design features and admits such a gradually sloping channel was feasible. (312, 327; Px-K. 98-100) Mitchell testifies through interaction the twenty or thirty or so designers on the Joe Creek project could have seen with due care, cases, likelihoods and safeguards to prevent such losses. (150)

After losses of concrete first occurred, Utility in fact tried various preventive measures, i.e., placing rip

rap, gabions, temporary steel plate cut-off walls, backfill and compacted dirt. (94-96) Kuhn and Mitchell testify that Utility could not implement these measures successfully, without design specifications, (including for gradation of rip rap (and rip rap in gabions) and procedures in placement and removal. (94-96, 144, 145) Cut-off walls, to remain in the structure are a change in design requiring the Government's designers' approval. (94-97; 160) Weldon Gamel testifies Utility did not have the choice of design under the contract. (308-309) All such measures are extremely/unreasonably slow and labor-and cost-intensive, and none is mentioned in the contract. 94-97; 160) The Government's directions (mainly to shift location of work) also did not mitigate the later losses. (96) Robert Kuhn

testifies that in such a contract, upon a major mishap, the contractor expects the owner's engineer to communicate what will work and to provide compensation. But although Corps personnel helped elsewhere, in the transition-section area, they were at a loss to help. (98)

Weldon Gamel also testified that the Government was under a contract duty to provide full information and to cooperate with and not to hinder the contractor. He testified that the Government's representatives did not intend Gen. Prov. 12, the flood reimbursement provision (Constr. Spec. Prov. 8) or the flood-defining provision (Constr. Tech. Prov. 1A-7.4) (or any other provision) to be a disclaimer of liability for defective specifications or breach of the aforesaid duties. (305-307; 354-361) He testified also that the contract allocated to the

contractor the risk of damage from all causes except (i) Government fault (in defective specifications or breach of the aforesaid duties) and (ii) as a specific clause (such as the flood reimbursement clause) allocated a risk to the Government without regard to the Government's fault. (358-360)

Weldon Gamel testified further that the flood-reimbursement provision (i) concerned damage to permanent work caused by a flood in itself and not by defective Government-furnished specifications or other Government fault or by the contractor's fault (hereinafter "pure flood damage"), and (ii) increased the risk on the Government, and was to lower contractors' bids. (338, 339, PX-K.180). He testified that "permanent work" includes both (i) concrete in place with underlying filter material, underdrain and

reinforcing steel ("concrete") and (ii) work prior to placement of concrete (such as filter material and grading) which would remain in the permanent structure upon placement of concrete ("non-concrete permanent work"). (339) Both parties expected pure flood damage to non-concrete permanent work. (89)

Weldon Gamel testifies he (Gamel) intended the flood-defining elevation to be "...sufficiently low...(to compensate) the contractor...for unusual occurrences." (341-342) Mitchell testifies its level is the five-year frequency event, a minor flood, which should not cause more than minor pure flood damage to concrete. (147, 148). Robert Kuhn also so interpreted it in bidding, i.e. that there would be no (or only minimal) damage to concrete below the elevation. (98). The elevation's authors

considered only the height of the water and not effects of the design on losses of concrete. (293, 294, 373-375; 344-347; 248, 161, 162) Tom Horner, one of the authors, testifies none of them knew in advance that there would be substantial damage to concrete upon flows below the elevation; moreover, if they had known, they would have put the information in the contract. (299, 300).

REASONS FOR GRANTING THE PETITION

1. Divergence on Design Warranty Question

J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 241 (Ct. Cl. 1965) sets out that Government-prepared specifications prescribing character, dimension and location of construction work, have an implied warranty ("...nothing else appearing") of

satisfactory performance upon compliance. The Court of Claims has characterized specifications of a contract as a whole, as one of just two types, design-type or performance-type, even though components or aspects may be easily severable. See e.g., Dygert, Implied Warranty in Government Contracts, 53 MIL. L. REV. 39, 49-51 (1971); see Aerodex, Inc. v. United States, 417 F.2d 1361 (Ct. Cl. 1969). In performance specifications, the contractor has choice of design and detail. Aerodex, Inc., ASBCA No. 7121, 1962 BCA Para. 3492, at 17,822.

J.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969), defined that contract specifications on pile-driving were "design" type (and within Hedin) due to details about materials and manner of performance, citing also that the Government was to approve the contractor's

procedures in advance. Id. 1362. It wrote that design specifications can set out precisely a limited number of main methods and also encompass a more multiple second level of orinary, incidental methods. Id. 1376.

On the "...nothing else appearing" element, in J.L. Simmons Co., supra, on a Government contention that the contractor should have known in advance of the design problem, displacement upon pile-driving, the Court decided that neither side expected such mass displacements deciding on what the Government's expectation was by examining features of the design--just as Mitchell has testified. Id. 1362. It amplified that "...the contractor cannot be charged with foresight greater than the Government's design engineers themselves possessed." Id. 1377. Further lucid statements are that the contractor-bidder

"...does not have the obligation to make a scientifically educated and skeptical analysis of the contract." (E. Arthur Higgins, ASBCA No. 76-128, 79-2 BCA Para. 14,050, at page 69,065) and "...has no duty to validate the adequacy of specifications prepared by the Government." (Ryan Aeronautical Co., ASBCA No. 13366, 70-1 BCA Para. 8287, at page 38,508.)

Further, in any event, the Government warrants performance by a method it expects the contractor will utilize. Helene Curtis Indus. v. United States, 312 F. 2d 774, 777 (1963).

When an initially non-apparent problem arises, a contractor is obligated to use reasonable measures to mitigate its damages. But it is not obligated to implement methods not specified in the specifications that are non-standard, as

they are (1) not feasible because of slowness, expense and hand labor, or (2) beyond the state of the art for contractors to implement without design specifications. Such special measures are part of the Government's design responsibility. J.L. Simmons Co., 1376-1377. Restat. of Contracts II Sec. 350 (1979)

The Kuhn, Gamel, Mitchell and Horner testimony indicates that the project specifications governed and controlled the work and were design specifications, both sides expected no losses of concrete, Utility was performing by expected methods, and when the problem arose, Utility adequately sought to mitigate the damage to concrete. Thus, Utility has right to recover. (85-88; 309, 310, 263-267)

The above rules apply to

pre-completion results as well as to the final product. J.D. Hedin itself involved a feature, too-thin steel casing, that affected driving into place but did not affect at all the foundation support the final, in-place concrete piles provided. 347 F.2d 241-243. In Ordnance Research v. United States, 609 F.2d 462 (Ct. Cl. 1971), the Court of Claims expressly rejected a Government contention its obligation was solely a "satisfactory end-product". There the contractor succeeded in producing many satisfactory end-products (magnesium firing caps), but in the midst of such production, also suffered six explosions, which were the basis of the claim. It isolated the cause and unilaterally changed its methods. On these design specifications, holding for the contractor, the Court cited with particular favor that the record

established the cause of the explosions, and that an additional step in the specifications solved the problem. Id. 480. In the same vein is R.E.D.M. Corp. v. United States, 428 F.2d 1304 (Ct. Cl. 1970).2/ Of course, Kuhn and Mitchell testify closely to causation. (89, 92, 93, 143-146)

In instances of performance specifications as well, the Government's liability extends to unsatisfactory pre-completion results (i.e., although the end-product performs), when the problem

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2/ For instance, Edward R. Marden Corp. v. United States, 442 F.2d 364, at 369 (Ct. Cl. 1971), cites non-disclosure of superior knowledge of vital information (on methods affecting only pre-completion results) as a "recharacterization" of a defective design specifications claim. On applicability of both misrepresentation and non-disclosure of superior knowledge on the same facts, see Helene Curtis Ind. and Aerodex, Inc. v. United States.

was not evident in advance, per the alternate theories of the Government's misrepresentation, or non-disclosure of superior knowledge. These theories overlap implied warranty of design, and each other.

In Government contracts, numerically the most frequent cases of misrepresentation are cases of " .implied representations,...(upon) omission of certain information." Sklute, Government Misrepresentation and Non-Disclosure of Superior Knowledge in Federal Procurement, 6 PUB CONT. L.J. 39, at 43 (1973) ("Sklute") In Helene Curtis, supra, at 775, 778, as basis for misrepresentation, the Court held the specification "very skimpy" and that "to reasonable bidders, it erroneously implied, in its context (emphasis supplied) that grinding (a more expensive method than the contractor

expected) would not be necessary. Thus, as unifying evidence, Kuhn testified "...this contract implied to me we would experience not more than minimal losses of concrete." (88)

In Aerodex, Inc. v. United States, 417 F.2d 1361 (Ct. Cl. 1969), the Court held there was an (implied) misrepresentation that an electronic component part was commercially available (or the Government could furnish its specifications) on basis of the "circumstances", including the contractor's previous experience, and the Government's not expecting such problems. The Court labeled the situation an "innocent misrepresentation" and balanced the contractor's not making inquiries against the Government's non-disclosure of unavailability, on the basis of "fault and reasonable expectation". Id. 1366-1367.

Sklute analyzes that the superior

knowledge theory is used when there is "no other express or implied representation to which the non-disclosure relates" --i.e., so that the superior konwledge theory will apply in all instances in which the misrepresentation theory applies, plus some. Sklute, at 43. Knowledge is frequently imputed to the Government if (implied) misrepresentations were made or the Government could have or should have obtained the vital information, considering its superior opportunity. Cryo-Sonics, Inc., ASBCA No. 11483, 66-2 BCA 5890; Aerodex, Inc. v. United States, supra, at 357; Womack v. United States, 398 F.2d 793 (Ct. Cl. 1968).

As indicating what is pertinent information Utility cites Edward R. Marden Corp. v. United States, 442 F.2d 364, at 369 (Ct. Cl. 1971), discussed, supra, fn. 2. Spearin, supra, is also written

heavily in terms of the Government's greater knowledge (about the effects of floods) from having authored the design.

Utility claims for implied innocent misrepresentations,3/ from omission of information (as Kuhn describes) and balancing fault and reasonable expectations, and on basis of knowledge imputed to the Government from such innocent misrepresentations and/or (as Kuhn and Mitchell describe) the Government's superior expertise and superior opportunity. (159, 309) Aerodex,

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3/ Complaint, paragraphs 9, 10, 13, 22, 24, 38 (10-16). Contrary to the Trial Court's contention, (8 Cl. Ct. 52, Appendix hereto ("App.") 43-44) Utility has closely explained this nexus at each juncture. Plaintiff's Trial Court Brief, pages 35-38 Official Transcript of Dec. 23, 1983 oral argument, pages 46-49 and 54-55.

Inc. v. United States, supra; Womack, supra. Each theory thus necessarily reaches the result that Utility cannot be held to greater foresight than the Government's design engineers.

For performance specifications, the obligation to mitigate damages is also just to use reasonable measures. Aerodex, Inc. v. United States, supra. The grant of a time extension is a "determination" (applicable to Utility) that the contractor was not negligent in executing the specifications, whether they are design-type or performance type. Hedin, 347 F.2d 245; Aerodex, 417 F.2d 1371.

The Trial Court Opinion (and Defendant) assert there is a hiatus in the law of implied warranty-misrepresentation -superior knowledge, as

1. Gen. Prov. 12, on the contractor's responsibility for the work until completion, and Spec. Prov. 8, a provision for

affirmative reimbursement, place the risk of these losses of concrete on the contractor.4/ 8 Cl. Ct. 46-49; App.15-24.

2. The Government is not obligated to insert design safeguards to make its structures impervious to events of nature prior to completion. 8 Cl. Ct. 49-50; App. 25-35..

However, Justice Brandeis in United States v. Spearin, 248 U.S. 132, 63 L.Ed. 166 (1918), writes as follows:

> The implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans and to assume responsibility for the work until completion and acceptance. (emphasis supplied) Id. 169-170.

General Provision 12 appears in all

4/ The Trial Court also cites as in the same mold Constr. Tech. Prov. 1A-7.3, that the contractor was to pump and divert water around the work. 8 Cl. Ct. 50, App. 35 But testimony is that (as everyone knew) such pumping diversion was physically impossible in the events in question. (90, 94)

Government construction contracts, and parallel provisions appear in other forms of Government contracts. See ASPR 7-602.13 (1964 June) and, e.g., 7-103.6

In the usual Government contract, the contractor bears the risk of increased costs resulting from "any cause except the fault of the...(Government) until acceptance." Nash, Risk Allocation in Government Contracts, 34 GEO. WASH. L. REV. 693, 701 (1966) ("Nash"): Edward R. Marden Corp., ASBCA No. 13199, 69-2 BCA Para. 7878, at 36,643. In the instant case, not utilizing known design safeguards, causing the losses of concrete, and not disclosing these effects is within the control of the Government and is Government fault. While the contractor bears the increased costs from set-backs (purely) from weather and floods as causes outside the control of either,

the flood-reimbursement clause enlarges the Government's liability under Gen. Prov. 12, "...to produce lower bids". Roen Salvage Co., ENG BCA No. 3670, 79-2 BCA Para. 13,882, at 68, 153; Al Johnson Constr. Co., ENG BCA Para. No. 3842, 3844, 79-2 BCA Para. 13,987, at 62,628-68,629.

Further, Government contracts contain implied duties of cooperation and not to hinder the contractor, "an implied warranty on drawings and specifications", and an "implied duty to furnish to the contractor information that is unknown and material to the written bargain of the parties." Nash, citing Spearin, J.D. Hedin, and Helene Curtis Indus. (all concerning pre-completion difficulties and, in Hedin and Helene Curtis, addressing defects and information affecting only pre-completion results). Nash cites that a "catalyst" to courts'

looking to these implied duties is the contractor's incurring a substantial loss on the contract. Nash, 706-710.

Pertinent to such duties, Robert Kuhn testifies that when (as the Court cites) he stated orally on May 14, 1979, Utility would not pursue a claim about a small (but more than minimal) loss of concrete, this was part of give-and-take in relations. Such relations are itself a factor why damage to concrete should not occur. (98)

If in bidding, Utility had knowledge that the Government considered itself not bound to utilize design safeguards to prevent water-discharge losses of concrete, and that such losses would occur, then Utility would not have bid on the project. (88) A contractor may not bid on and charge for such a visibly useless thing, as contrary to public

policy and illegal. J.D. Hedin, at 347 F.2d 235; 6A Corbin on Contracts, Sec. 1375 (1962) .While the Court cites L & A Contracting Co., ENG BCA No. 2690, 66-2 BCA Para. 5730, there the Board details the contractor (i) admitted he was aware in bidding, of the water table/hydrostatic pressure problem and (ii) was negligent (specifically naming feasible measures to prevent the damage).

The central case on weather damage is De Armas v. United States, 70 F. Supp. 605, 108 Ct. Cl. 436 (1947) which the Court, tellingly, did not discuss. There the contract was for repair of underwater voids in a sea wall by placing fascine mattresses covered by stones in two segments--first, ballast stone, to sink the mattresses, and then cover and core stone to be lowered on top. Id. 434-441. In issue was storm damage to

three such sunken fascine mattresses, lacking the final cover and core stone (which cover the Court found have avoided the damage). Id. 447-448 The Court deemed the contractor was not negligent as both sides (and their men at the site) were equally familiar with the area, work and its problems and had concurred in the practice.

Utility submits that in De Armas this danger was evident at the time of entering the contract. The contractor neither alleged nor proved misrepresentation or non-disclosure or that anything was wrong with the structure, in the contract specifications for the dimensions of the mattresses, ballast and core and cover rock. Further, the latter provided the information he needed to prevent the damage. Id. 465, 468. Thus, De Armas is a case of "pure flood" damage, for which

the Court held the contractor responsible, and is greatly different from the damage to concrete here.

For cases in which the contractor recovered for damage from weather (from non-evident effects caused by features of Government-furnished design) affecting only pre-completion results, Utility cites Anthony P. Miller, Inc. ASBCA No. 6383, 60-2 BCA Para. 2836 and Moore v. United States, 46 Ct. Cl. 139 (1910).

The Court (and the Government) incorrectly use Gen. Prov. 12 and Spec. Prov. 8 as disclaimers of liability for defective specifications. In addition to United States v. Spearin, Utility cites in rebuttal Thompson-Ramo-Wooldridge, Inc. v. United States, 361 F.2d 222 (Ct. Cl. 1966), for close discussion that in Government contracts, a provision must be specific to the nth degree to be an

effective disclaimer. In the same vein, in Bethlehem Steel Corp., ASBCA No.13341, 72-1 BCA 9186, the Board held ineffective attempted disclaimers on plans, e.g., that the contractor "shall be responsible for the correction of any unsatisfactory conditions..." Id. 42,581. Judge Shedd synopsized that both the Supreme Court (including in Spearin) and the Court of Claims have been "quite candid in refusing to give full literal effect to such specification provisions." Id., 42,589. See also Fehlhaber Corp. v. United States, 151 F.Supp. 817 (Ct. Cl. 1957) and United Contractors v. United States, 368 F.2d 585 (Ct. Cl. 1966),

The opinion ignores Weldon Gamel's testimony about the contract provisions (305-307; 338, 339, PX-K.180; 358-361),and contradicts-overrules these cases on required specificity

The cases Utility cites above all consider extrinsic evidence without mentioning the parol evidence rule--which in any event has exception upon plea of mistake or fraud or as an aid to interpretation and which allows always receiving and considering evidence before deciding not to vary terms. 3 Corbin on Contracts, Sec. 579, 580 (1960).

On Nature of the Evidence

Utility has discussed the entire case, to enable appreciating the overall position of the facts and that there are fact issues. Cutting across everything are (i) causation in features of the design and (ii) the expectation (and ethic) that Corps designers would insert available safeguards to prevent water-discharge losses of concrete. If a designer or bidder didn't foresee the causes (and effects) then he can't say he

expected losses of concrete. Thus, Utility cites the testimony of Tom Horner as sufficient in itself to raise requisite fact issues.

Robert Kuhn's reference to the "three or four" standard available procedures on any given aspect, is not to methods affecting water damage to concrete, but to procedures such as placing concrete by crane or by paving machine. (87-89; 456-458) Further, no measures were specified, because the Corps didn't foresee design effects, and intended there be nc lesses and no measures be implemented. (147, 148) In Ordnance Research, supra, in which a method of blending aimed at preventing explosions was specified, the contractor unilaterally chose to use another method. It experienced explosions upon its choice, and still recovered. Further, cutting

across such contentions are (i) misrepresentation/constructive superior knowledge and (ii) that even in their absence, on performance specifications, on a procurement by advertised competitive bidding, for fixed-price contract, the Government warranties performance is within the state of the contractor's art and is not economically unrealistic. Intercontinental Mfg. v. United States, 4 Cl. Ct. 591, 596 (1984); Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967). While the opinion wrongly cites Utility's attempting to implement reasonable measures after the problems arose as an admission (i.e. ignoring duty to mitigate damages) unlike in other cases, it does specify (i) what method should have been used to prevent damage or (ii) how such method was within the state of the art and feasible. See

Intercontinental Mfg., supra.

On the central question of whether the contractor "should have known", the Trial Court states just the following six-sentence conclusion at 8 Cl. Ct. 52. (and Appendix 44-45):

> In this case it is clear that any "knowledge" of the principles involved here, i.e., hydrology and weather, is not unique to defendant. Plaintiff has access to the same principles and knowledge available to the defendant. In fact counsel for plaintiff informed the court that plaintiff even has employees with this knowledge. If plaintiff failed to consult a hydrologist or review past area weather information, as the situation appears to be to the court, such failure is indefensible. Plaintiff's charge of "secretiveness" against defendant by failing to "instruct" plaintiff is a specious charge. Plaintiff is without excuse and cannot prevail on this count.

The opinion thus ignores and omits basic factors of the Corps' greater knowledge, the level and intent of the Corps' design effort, that the Government's engineers were closest to (and originated/caused)

the damage-causing features of the design, that changes in design would have prevented the damage to concrete, and the limited time for bidding. Further, these factors are clearly within the mold of analysis of all design-deficiency cases. Thus, Readers analyze that what is not said is just as important as what is said and recognize that if the Trial Court had a way to state facts that negated foregoing factors, it would have done so in detail.

The blank statement which the Trial Court contends Utility's counsel made, does not appear in the record. Utility's counsel's remarks were always that Plaintiff's personnel had certain knowledge of areas of hydrology hydraulics and design as revealed in the Kuhn affidavit, i.e., as experienced contractors, but not as experts, as were

the Government's personnel. (Official transcripts of August 24, 1984 oral argument, page 31 (lines 7-14) and 28 (line 3) to 31 (line 6), and of December 21, 1983 oral argument, pages 28-32 and 55).

The cases in this area involve production-type contracts in areas in which the contractor has experience and knowledge -- which, in weighing and balancing, the Courts find supports rather than bars its claim, based on defects in design. J.D. Hedin, Aerodex, Inc., Ordnance Research. Further, the opinion is inconsistent in citing the contractor's having knowledge, but imposing duty to employ consultants to study the design. No other federal contract case imposes such a duty because, inter alia the contractor can get its best information by asking the Government's own designers,

including at the pre-bid conference. The opinion imposes absolute requirement of unlimited consultant study, until all design effects are determined.

The Court's six-sentence conclusion cites no cases and engages in no methodology as in i.e., unlike (i) J.L. Simmons or (ii) Aerodex, Inc. v. United States and Womack, in weighing-balancing, or (iii) Intercontinental Mfg., supra, finding the information was communicated at the pre-bid conference. It cites no evidence that Utility's personnel were experts in hydrology-hydraulics/design or had equal knowledge or opportunity with the Government. If it could have done so, the opinion would have recited in detail such reason or evidence. Instead, it engages in 20/20 hindsight.

In addition, in bidding, Kuhn and other personnel visited the site and

provisions and the contract, and is not an unauthorized deviation from ECI 7-671.3. The court finds for the defendant on count III.

CONCLUSION

The court accordingly grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment on Count III of its Complaint and the clerk of the court is ordered to dismiss the Complaint.

IT IS SO ORDERED.

MOODY R. TIDWELL
Judge

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UTILITY CONTRACTORS, INC., Appellant	)	
v	)	Appeal No. 85-2504
THE UNITED STATES, Appellee	)	

DECIDED: January 21, 1986

Before BALDWIN, Circuit Judge, NICHOLS, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

The order appealed from is affirmed. The issues argued on behalf of appellant here are all ably dealt with in the opinion of Claims Court Judge Tidwell, Utility Contractors, Inc. v. United States, 8 Cl. Ct. 42 (1985), and the said opinion is therefore adopted as the basis of our decision.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UTILITY CONTRACTORS, INC., Plaintiff-Appellant,	)	
v.	)	No. 85-2504
THE UNITED STATES, Defendant-Appellee.	)	

J U D G M E N T

ON APPEAL from the UNITED STATES CLAIMS COURT IN CASE NO(S). 416-82 C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

FRANCIS X. GINDHART, CLERK

Dated: January 21, 1986
ISSUED AS A MANDATE: April 14, 1986
COSTS, Against Appellant
Printing---------$128.48
Total-----------$128.48

IN THE UNITED STATES CLAIMS COURT

No. 416-82 C

UTILITY CONTRACTORS, INC.

v. JUDGMENT

THE UNITED STATES

Pursuant to the opinion of April 22, 1985, it was held that plaintiff is not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Frank T. Peartree
Clerk of Court

April 22,1985

By: Debra L.Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

CONSTITUTIONAL PROVISIONS INVOLVED

Article III Secs. I & II

> Sec. I. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish; the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.
>
> Sec. II. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; --to all cases affecting ambassadors, other public ministers and consuls; --to all cases of admiralty and maritime jurisdiction; --to controversies to which the United States shall be a party; --to controversies between two or more states; --between a state and citizen of another state; --between citizens of different states; --between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATUTES INVOLVED

28 U.S.C. Sec. 1491 (1970) (including 1972

amendment by PUB. L. 92-415,
Sec. 1, 86 Stat. 652)
The Court of Claims shall have Jurisidiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corpos Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders direction restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley

Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the authority.

41 U.S.C. Sec. 609(a)

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

Pub. L. 95-563, Sec. 16, 92 Stat. 2391 Section 16. This act (enacting this chapter and amending section 5108 of Title 5, Government Organization and Employees, sections 1346, 1491, 2401, 2414, 2510, and 2517 of Title 28, Judiciary and Judicial Procedure, and section 724a of Title 31, Money and Finance) shall apply to contracts entered into one hundred twenty days after the date of enactment (Nov. 1, 1978). Nothwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

Pub. L. 97-164. Sec. 161 (10), 96 Stat. 49 substituted in 41 U.S.C. Sec. 609 (a), "Claims Court" for "Court of Claims

Pub. L. 97-164, Sec. 133(a), 96 Stat. 39,

SEC. 133, (a) Section 1491 of title 28, United States Code, is amended to read as follows:
"Sec. 1491. Claims against United States generally; actions involving Tennessee Valley Authority

"(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or

official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

"(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

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*
*

Pub. L. 97-164, Title 1, Sec. 403, 96 Stat. 57

Sec. 403(d)
Any matter pending before a commissioner of the United States Court of Claims on the effective date of this Act (Oct. 1, 1982), or any pending dispositive motion that the United States Court of Claims has not determined on that date, shall be determined by the United States Claims Court.

Pub. L. 97-164, Sec. 402, 96 Stat. 57

SEC. 402. Unless otherwise specified, the provisions of this Act shall take effect on October 1, 1982.

28 U.S.C. Sec. 171

(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States.

28 U.S.C. Sec. 172

(a) Each judge of the United States Claims Court shall be appointed for a term of fifteen years.

(b) Each judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

28 U.S.C. Sec. 176

(a) Removal of a judge of the United States Claims Court during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.

(b) Before any order of removal may be entered, a full specification of the charges shall be furnished to the judge involved, and such judge shall be accorded an opportunity to be heard on the charges.

(c) Any cause for removal of any judge of the United States Claims

Court coming to the knowledge of the Director of the Administrative Office of the United States Courts shall be reported by him to the chief judge of the United States Court of Appeals for the Federal Circuit, and a copy of the report shall at the same time be transmitted to the judge.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Peter J. O'Loughlin
2211 Norfolk, Suite 700
Houston, Texas 77098
Telephone: (713) 529-1018
Attorney for Petitioner

CERTIFICATE OF SERVICE

On June 17, 1986, I served the above on the attorneys in said action, by placing three copies thereof in a sealed envelope with postage fully prepaid, in the United States Post Office mail box in Tampa, Florida, addressed as follows:

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

_____
Peter J. O'Loughlin

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UTILITY CONTRACTORS INC.,	)	
Appellant,	)	
v.	)	Appeal No: 85-2504
THE UNITED STATES,	)	
Appellee.	)	

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart, Clerk

Date: MAR 19 1986

IN THE UNITED STATES CLAIMS COURT

(FILED: April 22, 1984)
No. 416-82C

UTILITY CONTRACTORS, INC., Plaintiff, v. THE UNITED STATES, Defendant.	Government contract; risk of loss; defective design specifications; performance specifications; pre-completion damage; deviation from required provisions.

Peter J. O'Loughlin, Houston, Texas, attorney for plaintiff.

R. Anthony McCann, Washington, D.C., with whom was Assistant Attorney General J. Paul McGrath, for defendant.

OPINION

TIDWELL, Judge:

This is a government contract case which comes before the court pursuant

to the Contract Disputes Act of 1978. Plaintiff seeks $1,743,366 on three alternative theories for reimbursement of increased costs resulting from water damage to permanent work on the "Joe Creek" Canal Lining Project. Defendant filed a Motion for Summary Judgment on all three counts which is opposed by plaintiff. Thereafter, plaintiff filed a Partial Cross-Motion for Summary Judgment on Count III of its Complaint, which defendant opposed. Oral argument was heard on both motions. After careful consideration of the documentary evidence and oral arguments, the court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Partial Cross-Motion for Summary Judgment on Count III of the Complaint.

FACTS

Plaintiff, Utility Contractors,

Inc. is a Kansas corporation with principle offices in Wichita, Kansas. On February 16, 1978, defendant, through the Corps of Engineers, awarded formally-advertised Contract No. DACW 56-78-C-0073 to plaintiff for the construction of approximately a two and one-half mile span of channel lining and other improvements on Joe Creek in Tulsa, Oklahoma.

The project was the result of several years of extensive studies by the Corps beginning in 1969, the purpose of which was to eliminate flood damage which occurred periodically during severe rainstorms. The project was intended to collect all rainwater in the area and channel it through the city and into the Arkansas River without causing damage. Joe Creek, an active regularly flowing

stream, was designated as a major artery for the operation of the flood control system.

The contract required plaintiff to perform channel and drainage excavation. Fill and backfill were also required, as well as placement of riprap on the bottom and slope of the channel for 2,000 feet at the lower end of the project and placement of concrete channel lining, with subdrainage system, for approximately 8,900 feet at the upper end of the project. These improvements were intended to provide a straightened, widened channel, with riprap or concrete surface that, by providing decreased resistence to water flows, would permit increased velocity of water flow which, in turn, would increase channel capacity without overflowing its banks. The completed project span was to and including the

100-year frequency flood. 1/ The contract also required the construction of a concrete transition section in order to lower the elevation of the channel. This section would follow the natural creek bed as effected by erosion.

The contract price was set at $6,489,249.65 with completion to be within 945 days of receipt of notice to proceed. The project was completed on December 5, 1980, within the contract performance date as extended by 33 days by the contracting officer. The completed project was accepted by defendant and on November 11, 1981, defendant paid plaintiff the amount due and owing except for $100 retainage.

Plaintiff's claims arise out of

1/ The statistically derived expectancy of such a flood is one that is expected to be equaled or exceeded once in 100 years in that channel.

certain weather related events that occurred during performance of the contract, i.e., heavy rainstorms occurred on June 8 and 20 and July 7, 1979, that caused the normal stream flows to overtop temporary cofferdams built by plaintiff to keep the construction area dry, as required by the terms of the contract. This over-topping caused damage to permanent concrete work and permanent and temporary excavation and fine grade filter material then in place. Less severe storms on May 12, 1979 and May 2 and June 17, 1980 caused similar results although with less damage to concrete and filter material. There were other rainstorms throughout the construction period but did no, or only minor damage to the permanent work, and are not at issue here. Plaintiff and its "Monday morning quarterback" engineers and heavy

construction designers claim that the damage occurred because defendant failed to include in the contract detailed specifications and procedures for the protection of the permanent work during the construction phase. Plaintiff also blames the design of the transition section for many of its problems.

Paragraph 12, the Permits and Responsibility Clause of the General Provisions (construction contract), and the Damage to Work Clause, Paragraph 8, of the Construction Special Conditions place the risk of loss for all pre-completion damage to permanent work on plaintiff with the exception of damage caused by flood or earthquake. Accordingly, plaintiff was required to replace, at its own expense, all damage to permanent work, except that which fell, in the judgment of the contracting officer, within the defined

flood or earthquake exceptions,a nd provided the damage was not due to plaintiff's negligence or failure to use good engineering and construction procedures. Such damages would be reimbursed by defendant. This contract also defined "flood" in the Control of Water During Construction Section of the Technical Provisions, Paragraph 7.4.

Prior to the June 8, 1979 rainstorm, the first storm which resulted in heavier than normal damage, there had been several smaller storms which caused some damage to the project. The parties, in discussing these initial events at the time they occurred, agreed that plaintiff was responsible for those losses pursuant to the contract since the water flows had

not reached the defined "flood" level. 2/ However, after the first major storm, on June 8, 1978, plaintiff notified defendant that it would make a claim to recover the cost of repair and replacement of the permanent work. Thereafter, plaintiff filed with defendant a claim for each of the subsequent events despite the fact that at no time during the performance period of the contract did the water flows reach the defined "flood" elevation.

After each of the above-mentioned larger losses of concrete, defendant's representatives visited the construction site to observe the losses of concrete.

2/ Paragraph 7.1 of the Technical Provisions requires the contractor to design and construct protective works of a sufficient size and design "to prevent damage to the work during construction." If the protective works are inadequate the contractor shall, at its expense, make the necessary corrections.

On each occasion plaintiff complained about the defects of the transition section and filter-material design and indicated that it would file a claim under the contract. However, at no time prior to June 8, 1979 did plaintiff attempt to implement sufficient measures to protect the unfinished permanent work from storm damage.

After June 8, in an attempt to assist plaintiff from additional losses, plaintiff contends that defendant directed plaintiff to work on placing concrete slopes and bottoms at specified locations rather than replacing concrete directly in the transition section, and to excavate and place rock and other materials at various locations in the bottom of the channel, which plaintiff did. However, plaintiff admittedly sought to mitigate damages by implementing its own measures.

Without defendant's direction, advice or assistance, plaintiff placed at exposed edges of concrete riprap, steer plate cut-off walls, backfill, and, at the leading edge of the transition section, compacted dirt from the area. Plaintiff, also on its own initiative, placed gabions at exposed upstream edges of concrete and helped prevent some further losses of concrete but were not completely effective. Plaintiff also retained its own engineering design consultant after the three major events that caused damage to permanent work and large losses of concrete. At the consultant's suggestion, plaintiff requested a change to permit the use of coarse-graded in lieu of the fine-graded filter material as required by the contract. Plaintiff alleges that defendant denied the request but offers no evidence as to what result may have

otherwise occurred.

Plaintiff, in each instance, made the necessary repairs and notified defendant of its intention to claim compensation for increased cost of performance. Pursuant to the Contract Disputes Act of 1978, plaintiff requested equitable adjustment from the contracting officer by letters dated December 2, 1980 (for the larger losses of concrete in the June 8 and 20 and July 17, 1979 events) and February 13, 1981 (for the smaller losses of concrete). On September 28, 1981 the contracting officer rejected plaintiff's claims stated in the February 13, 1981 letter for lack of timely notice, which prevented defendant's ability to investigate. The claims in the December 2, 1980 letter were denied by the contracting officer on the merits.

On August 20, 1982 plaintiff

filed suit in this court based on three alternative theories of recovery: Breach of contract based on defective design specifications; reformation of contract due to mutual mistake; and damages based on an unauthorized deviation from the Damage to Work Clause, Paragraph 8, of the Construction Special Conditions. Defendant filed a Motion for Summary Judgment challenging the entirety of plaintiff's complaint and plaintiff filed a Cross-Motion for Summary Judgment on the third issue, the alleged unauthorized deviation issue.

Jurisdiction is proper in this court pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 609(a) and this court's general jurisdictional statute, the Tucker Act, 28 U.S.C. 1491.

DISCUSSION

Defendant seeks summary judgment

and an order dismissing plaintiff's Complaint. To grant Defendant's Motion for Summary Judgment there must be no genuine issue of any material fact. South Louisiana Grain Service, Inc. v. United States, 1 Cl.Ct. 281, 289 (1982); Technograph Printed Circuits, Ltd. v. United States, 178 Ct.Cl. 543, 560, 372 F.2d 969, 980 (1967). The court will first examine the operative sections of the contract and their effect before individually addressing plaintiff's three theories of recovery.

The principal question before the court is which party must bear the responsibility for damage to permanent construction prior to completion of the contract. Defendant contends that the language of the contract is clear and places responsibility on the contractor. (See footnote 2, supra.) Plaintiff

challenges this traditional approach to the resolution of government contract disputes by asking the court to give recognition and credence to at least one of its three theories of recovery. The court finds, however, that there is a greater wisdom behind the traditional interpretation given government contract disputes in the federal common law when it finds the contract provisions to be as clear as those in this case.

The court finds in the first instance that the contract language governing these issues is unambiguous, in that it simply and without doubt places all responsibility for pre-completion work damage on the contractor, with the dual exceptions for flood and earthquake

damage. The permits and Responsibilities Clause 3/ of the Construction General Provisions, provides that the contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work. The two exceptions to this contractor responsibility provision are found within the Construction Special

---

3/ 12. PERMITS AND RESPONSIBILITIES (1964 JUN):

. . . (Contractor) shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

Provisions in the Damage to Work Clause.

4/ The Damage to Work Clause, which incorporates by reference the Permits and Responsibilities Clause, and is repeated verbatim in the Engineer Contract

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4/ Construction Special Provisions:

8. DAMAGE TO WORK (1966 MAR OCE). The responsibility for damage to any part of the permanent work shall be as set forth in the clause of the contract entitled "Permits and Responsibilities." However, if, in the judgment of the contracting officer, any part of the permanent work performed by the contractor is damaged by flood or earthquake, which damage is not due to the failure of the contractor to take reasonable precautions or to exercise sound engineering and construction practices in the conduct of the work, the contractor will make the repairs as ordered by the contracting officer and full compensation for such repairs will be made at the applicable contract unit. . . . Except as herein provided, damage to all work (including temporary construction), utilities, materials, equipment, and plant shall be repaired to the satisfaction of the contracting officer at the contractor's expense, regardless of the cause of such damage. (ECI 7-671.3)

Instructions (ECI) 7-671.3, unquestionably states that plaintiff must repair damage to permanent work prior to acceptance by the defendant at its expense. However, defendant will reimburse plaintiff its costs incurred in making the repairs at a later date if the defendant's contracting officer finds that plaintiff was not negligent and that it used good engineering and construction principles. Taken together, the two clauses place all pre-completion damage responsibility on the contractor, with the only exception giving discretion to the contracting officer to compensate for flood and earthquake damages.

Since there are no allegations of earthquake damage, the questions that remain are: What qualifies as flood damage and do the conditions set forth in this complaint qualify as such. The

Damage to Work Clause (ECI 7-671.3), contains no definition for the word "flood." The contract, however, at paragraph 7.4 of the Technical Provisions included a definition for flood in order to avoid undesirable contingencies in bidding by establishing a standard for damage responsibility which would be reasonable and workable.

The definition of flood is precisely defined in Paragraph 7.4 of the Technical Provisions of the contract. Unless there is a flow in the channel cf at least 630.5 feet above mean sea level between station 114 + 44 and the downstream limit of 651.8 feet above mean sea level between station 114 + 44 is no flood. Since there was no flow in the channel of 630.5 feet or more, during the contract performance period, and plaintiff has not alleged the contract performance

period, and plaintiff has not alleged that any of the flows causing the damage exceeded 630.5 feet, plaintiff is responsible for all the damage to the work in accordance with the above-cited specifications.

Plaintiff admits that the water damage incidents in question do not meet the required standard defined in the contract in order to place the responsibility on the government. However, plaintiff contends that neither party expected such damage and that the flood defining provision should have been set at a lower level where plaintiff would only be responsible when minimal damage occurred. In the alternative, plaintiff contends that the flood provision, as defined in the contract, should be stricken from the contract because it improperly deviates from the procurement

regulations then in force, the Armed Services Procurement Regulation (ASPR) 1-109 and the ECI 1-109.

It is evident to the court that neither party expected the nature of damages for water below the flood definition level. However, it is an irrefutable fact that plaintiff was aware of the definition of flood in the contract. This is evidenced by plaintiff's admission that it adjusted the price of its bid from the price it had derived from the initial bid, which did not contain a flood defining clause. Plaintiff's acknowledgment of the flood definition, as evidenced by its bid adjustment, leaves the court no choice but to interpret and implement the contract as it was clearly written. It is well settled that where one agrees to do, for a fixed sum, a thing possible to be

performed, he will not be excused or become entitled to additional compensation, becasue unforeseen difficulties are encountered. United States v. Spearin, 248 U.S. 132, 136 (1918); Day v. United States, 245 U.S. 159 (1917).

There is no need for the court to consider parol evidence as to plaintiff's intentions or interpretations concerning a contractual clause when it is clear and lucid. Moreover, the court's position on the parol evidence rule is well stated in Baggett Transportation Co. v. United States, 162 Ct. Cl. 570, 577-578, 319 F. 2d 864, 868 (1963):

> The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks * * * Thompson v. Libbey, 34 Minn. 374, 26 N.W. 1 (1885). It is

difficult to see how Quotation No. 52 could have spelled out more lucidly the conditions under which the alternative rates of $1.60 and $1.38 were applicable. There is no ambiguity here. Consequently, parol evidence will not be considered. Mason v. United States, 144 Ct. Cl. 579, 169 F. Supp. 507 (1959); Western Mach. Co. v. Northwestern Implement Co., 254 F.2d 453, 458 (9th Cir. 1957).

The court, in the present case finds the flood reimbursement provision and definition perfectly clear and finds no reason such as mistake or fraud, to consider any parol evidence on this point. The court will now address plaintiff's three alternative positions.

I

Plaintiff seeks equitable adjustment to the contract price because of alleged defective design specifications and breach of an implied warranty of design. Plaintiff claims that the filter material and the design of the transition section was defective and that the failure of the specifications to contain either detailed instructions and procedures for protecting the unfinished permanent work 5/ or a warning of expected losses constituted a design defect. Plaintiff's contentions are without merit.

Plaintiff contends that it is

5/ "Permanent work," as defined by Mr. Weldon M. Gamel, Civil Engineer for U.S. Army Corp of Engineers was: "work performed by the contractor which would become a part of the completed project, as opposed to that of a temporary nature which would not become a part of the completed project." This interpretation was cited positively by plaintiff and is accepted by the court.

entitled to recover losses caused by defective specifications for placement of the concrete. Without explaining how, plaintiff claims that this resulted in damage to the concrete "(i) by requiring the transition section design and fine-graded filter material and (ii) by omitting known safeguards, (cutoff walls and measures at exposed edges of concrete between placements) which made the aforesaid transition section and filter material made necessary." Plaintiff states that these specifications were detailed design specifications with only a limited number of available procedures. It is from this premise that plaintiff asks for relief from the application of the government's implied warranty of its design specifications, as set out in J.D. Hedin Construction Co. v. United States, 171 Ct. Cl. 70, 76, 347 F.2d 235 (1965).

It is well settled that where the government orders a structure to be built, and in so doing prepares the project's specifications prescribing the character, dimension, and location of the construction work, the government implicitly warrants, nothing else appearing, that if the specifications are complied with, satisfactory performance will result. E.g., United States v. Spearin, 248 U.S. 132 (1918); Laburnum Construction Corp. v. United States, 163 Ct. Cl. 339, 325 F.2d 451 (1963); Arcole Midwest Corp. v. United States, 125 Ct. Cl. 818 (1953); Stapleton Construction Co. v. United States, 92 Ct. Cl. 551 (1940).

Both parties cite J.L. Simmons Co. v. United States, 188 Ct. Cl. 684, 689, 412 F.2d 1360, 1362 (1969) as a proper standard for defining design specifications. That court stated:

> The specifications, which were prepared by the defendant, are a classic example of "design" specifications, and not "performance" specifications. In other words, in these specifications, the defendant set forth in precise detail the materials to be employed and the manner in which the work was to be performed, and plaintiff was not privileged to deviate therefrom, but was required to follow them as one would a road map. In contrast, typical "performance" type specifications

> set forth an objective or standard to be achieved, and teh successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection.

Plaintiff argues that the contract contained only design specifications and that the strict observance of the government's design specifications triggers the government's implicit warranty that satisfactory performance will result if the specifications are followed to the letter. United States v. Spearin, 248 U.S. 132, 137 (1918). Applying Ordnance Research v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979) and R.E.D.M.

Corp. v. United States, 192 Ct. Cl. 891, 428 F.2d 1304 (1970). Plaintiff, however, asks this court to go one step further and to apply this implicit warranty to pre-completion difficulties.

Defendant in its Motion for Summary Judgment cites cases which stand for the proposition that the government is under no obligation to design its construction projects so that they are impervious to all events of nature prior to completion. L. & A. Contracting Company, ENG BCA No. 2690, 66-2 BCA Paragraph 5730 at 26,717-26,718 held that:

> . . . . we cannot find on record in this case that compliance with the plans and specifications would produce anything other than satisfactory results. The evidence is that the completed drainage ditch is

> satisfactorily performing the function for which it was designed. . .
>
> . . . It is true that the design did not prevent damage while the ditch was in an uncompleted state. But the government was under no obligation that it do so. The contract very clearly places upon appellant responsibility to protect uncompleted work. The risk of loss, unless caused by Government fault or placed upon the government by some special provision of the contract, follow the responsibility to protect. . . .

Defendant in its reply brief agrees in part with plaintiff on the application of Ordnance Research v. United

States, 221 Ct. Cl. 641, 609 F.2d 462 (1979) and R.E.D.M. Corporation. v. United States, 192 Ct. Cl. 891, 428 F.2d 1304 (1970), in that if such specifications prove defective the government must compensate the contractor for the additional cost of performance. Also, as defendant points out, plaintiffs recovered in Ordnance Research and R.E.D.M. Corporation for pre-completion losses because the specifications were deemed to be defective. Taken collectively, these cases stand for the proposition that in a design specification contract, absent any contract provisions to the contrary, the government implicitly warrants that satisfactory performance will result. This is not a warranty against pre-completion losses unless they are caused by compliance with government's defective design specifications.

However, defendant contends that the present case differs from Ordnance Research in that the government did not specify the way to build and protect the channel improvements during construction, and, more importantly, differs from R.E.D.M. Corporation because in the present case an acceptable structure could have been and was produced. To award pre-completion damages, the court must make two determinations: (1) Were the specifications so specific so as not to allow plaintiff any discretion in constructing the project and specifically the transition section; and (2) if so, were the specifications defective.

The court agrees with defendant that it did not specify the way to build or protect the channel improvements. Plaintiff, in its opposition, even admits there were three or four available

construction procedures, e.g., all of which were standard and fully acceptable. While the court is aware of the responsibilities of the government for pre-completion damage when it provides defective design specifications, absent such findings, defendant's obligation to plaintiff is to provide specifications, which, if followed, will result in a functioning project which can be built. Jefferson Construction Co. v. United States, 183 Ct. Cl. 720, 727, 392 F.2d 1006, 1011, cert. denied, 393 U.S. 842 (1968). Defendant was not required to design this project or provide protective measures so the project could be built under all situations, including heavy rainstorms. Plaintiff in turn was required to possess sufficient knowledge of engineering, including hydrological expertise and construction skills to

protect unfinished work from the effects of inclement weather. Plaintiff knew, as well as defendant, that there was a distinct possibility of heavy rains at certain times of the year in Tulsa and that pre-completion damage to the project could necessarily follow. It was for this reason that the government required plaintiff to plan its dikes, cofferdams, etc. to fail before the water rose too high and created an even worse flood. The contract, Technical Provisions paragraph 7.3, for example, required the dikes and cofferdams to fail when overtopped. 6/

6/ 7.3 Dikes and Cofferdams. Design and location of dikes and cofferdams shall be the responsibility of the contractor except for the following limitations. Dikes or cofferdams shall not back water at any point to more than one-half the depth of the channel at any time during construction and shall be designed and constructed to fail when overtopped.

The court is convinced that this contract was a "performance" contract. Admittedly, there were instances where the Corps' performance specifications could be interpreted as design specifications but, upon careful analysis, it becomes readily apparent that the contract as a whole failed to pass the "design" specification test. Like Penguin Industries, Inc. v. United States, 209 Ct. Cl. 121, 530 F.2d 934 (1976), defendant drafted and used performance specifications and what might be considered by some as design specifications in the same contract. This does not make the contract a "design" contract because even the so-called design

specifications contained performance-type requirements. 7/ It must be borne in mind that design specifications are explicit, unquestionable specifications which tell the contractor exactly how the contract is to be performed and no deviation therefrom

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7/ The court has difficulty in believing that every government contract entered into can so neatly be placed in such black and white terms as design specification or performance contract. The court does not necessarily find that these terms have to be so mutually exclusive. Certainly one can find numerous government contracts exhibiting both performance and design specifications characteristics. One such case that notes such a possibility is J.B. Williams Co. v. United States, 196 Cl. Ct. 491, 509, 450 F.2d 1379, 1389 (1971).

It is stated as follows:

> Coupled with the Board's finding that the specification was 'both a performance and design specification, primarily the former. . .'

The court finds that such a possibility is present in the case at bar, as both design specifications and performance characteristics are evident in the contract.

is permissible. This contract was replete with examples such as DIVISION 3, SECTION 3A-CONCRETE, which stated, in detail, how the concrete was to be mixed, its contents, proportioning, production, etc. Yet, at almost every step, the contractor was to use its own judgment and experience in deciding how, when, where, under what conditions, and which proportion would be best for which project section. Plaintiff had a duty as set forth in great detail in the contract to exercise its own judgment and experience. The contract is more like a performance contract than a design contract, because plaintiff had the ". . . responsibility for the means and methods selected to achieve the end result." J.L. Simmons Co. v. United States, 188 Ct. Cl. 684, 412 F.2d 1360 (1969). For these reasons the court agrees with defendant that the specifications provided in the

present case do not implicitly warrant pre-completion construction or successful end product.

Plaintiff seeks equitable adjustment to the contract price because of differing site conditions. Plaintiff contends that the design of the transition section caused extreme and unnatural damage due to high water velocity and turbulence, which constituted a differing site condition. To support this contention, plaintiff imprecisely cites Roen Salvage Co., ENG BCA 3670, 79-2 BCA 91 13,882. The Board does state, as plaintiff attempted to cite, that:

> Thus, though bad weather, in itself, is not a differing site condition . . . weather may bring out latent adverse characteristics of an ostensibly

> normal site condition. This is compensable under the clause.

(Citations omitted.)

This decision is particularly helpful, but not because of the section plaintiff cites. In the very next paragraph, the Board states, in pertinent part:

> On the other hand, drifting snow which blocked the access road to the site was not a changed condition. . . . And inundation by surface flooding following heavy rains is one of the hazards of the undertaking a contractor assumes when he enters into a contract.

(Citations omitted.)

The Board decision also stated that unusually high and turbulent waters which impeded performance of the dredging

contract and resulted in frequent breakdowns was not a changed condition citing Standard Dredging Corporation, ENG BCA No. 2657, 69-1 BCA Paragraph 7379. The court finds this conclusion to be most insightful to the present case.

The court of Claims decisions reveal that rain weather conditions do not constitute a valid basis for a differing site condition claim. In Arundel Corporation v. United States, 103 Ct. Cl. 688, 711-712 (1945), plaintiff, a dredging contractor, sued for damages it allegedly suffered because a hurricane reduced the amount of material to be dredged. The court held:

> . . . It is a general principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act

> of God, unless such an obligation is expressly assumed. Here, the contract was silent in that regard and whatever loss plaintiff may have sustained must be borne by it, and not by the Government.

Further, the Court of Claims stated in Turnkey Enterprises v. United States, 220 Ct. Cl. 179, 187, 597 F.2d 750, 754 (1979):

> The flow of the river and rainfall are so intertwined as to make it impossible to separate the river conditions from the weather. The record demonstrates clearly that weather was the dominant factor which actually determined the nature of river conditions during the period in issue. Weather, as indicated

previously, is not a risk which is shifted to defendant via the changed conditions clause. Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 485-86, 458 F.2d 1364, 1370-71 (1972).

Plaintiff's final contention under claim one is that defendant's non-disclosure of its "constructive superior knowledge" of the differing site conditions and possible preventive measures is a breach of contract. In other words, plaintiff claims that defendant's respected experience and expertise in the engineering field and in the construction of similar projects gave it superior knowledge to that of plaintiff which, plaintiff, claims, should have been imparted to plaintiff via the design specifications. Plaintiff uses the phrase

"constructive superior knowledge," but does not bother to define it for the court. If the court had to guess it would say that constructive superior knowledge is superior knowledge that is not known to defendant, but should be, and according to Shea, infra, must be disclosed to plaintiff. We assume that plaintiff intended "constructive superior knowledge" to mean the same as superior knowledge, and will act accordingly. "Superior knowledge" is defined as knowledge which is vital to performance of the contract but which is unknown and is not reasonably available to bidders who are thereby misled. The government must disclose such superior knowledge or be held liable for breach. J.F. Shea Co., Inc. v. United States, 4 Cl. Ct. 46 (1983). In this case it is clear that any "knowledge" of the principles involved here, i.e., hydrology

and weather, is not unique to defendant. Plaintiff has access to the same principles and knowledge available to the defendant. In fact, counsel for plaintiff informed the court that plaintiff even has employees with this knowledge. If plaintiff failed to consult a hydrologist or review past area weather information, as the situation appears to be to the court, such failure is indefensible. Plaintiff's charge of "secretiveness" against defendant by failing to "instruct" plaintiff is a specious charge. Plaintiff is withoug excuse and cannot prevail on this count.

II

Plaintiff claims that it should be awarded the costs of damages under the flood damage reimbursement provisions based on several theories of recovery: Reformation for mutual mistake;

interpretation of the flood provision and contractor's mistake in bid.

Plaintiff contends that the flood-defining provision is not an accurate reflection of what the Corps intended to accomplish as it does not adequately allocate the responsibility for damages between the two parties. Plaintiff admitted that at the time the contract was entered into it regarded the provision as an authoritative derivation of a fair and equitable demarcation point, representing the point at which responsibility for damages passes from the contractor to the government. Plaintiff contends that it was their understanding that there would be no damage caused by water levels below this definition. Plaintiff now argues that there was a mutual mistake with the derivation of this figure because there was damage caused by

water levels below this level. The court finds that plaintiff is unable to sbstantiate that any mistake was made in the formulation, interpretation and understanding of the of the provision. The provision was established to provide a standard by which the contracting officer could determine whose responsibility any flood damaging events might be.

In a case similar to the present one, Fraass Surgical Manufacturing Co., Inc. v. United States, 215 Ct. Cl. 820, 825, 571 F.2d 34, 37 (1978), plaintiff unsuccessfully sought, through reformation, to rectify the alleged mistaken inclusion of a clause. The clause in question allotted to the contractor risk of loss by fire of government-furnished materials. Plaintiff maintained that the government intended to include a different clause. The court

stated it normally grants reformation when there has been a mutual mistake of fact, which causes the terms of the written contract to depart from the actual intention of the parties. Fraass Surgical Mfg. Co. v. United States, 215 at 596, 571 F.2d at 713 (1974); Space Corp. v. United States, Inc. v. United States, 188 Ct. Cl. 31, 35, 411 F.2d 1020, 1022 (1969). However, the plaintiff in such a case must show that the government would have agreed to the contract if worded in accordance with the plaintiff's intention. It is clear in the present case that defendant did not. Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135, 150-151, 475 F.2d 630, 639 (1973); McNamara Construction of Manitoba Ltd. v. United States, 206 Ct. Cl. 1, 9-10, 509 F.2d 1166, 1170 (1975). Another justification for reformation is for the plaintiff to

show that the mistake was one of which the government either knew or should have known. Burnett Electronics Lab., Inc. v. United States, 202 Ct. Cl. 463, 472, 479 F2d 1329, 1333 (1973); Ruggiero v. United States, 190 Ct. Cl. 327, 339-40, 420 F.2d 709, 715-16 (1970). Plaintiff, in alleging that there was a mistake has not satisfied the court that any mistake was made in light of the clearness of the agreement. Even if plaintiff was able to satisfy the court that there was a mistake, which it has not, the plaintiff still has not proven to the court's satisfaction, as required by the above-cited case law, that the government would have entered the contract if worded in accordance with plaintiff's alleged intention or that the government did know or should have known of any mistake. Indeed, plaintiff has failed to show the

very existence of a mistake in the contract.

Plaintiff also asks the court to re-interpret Paragraph 7.4 of the Technical Provisions, the flood definition term, to its benefit. This court has stated previously, when a written term of a contract is unambiguous on its face, and is subject to no more than one interpretation, no legitimate purpose exists for introducing strained evidence of prior negotiations or understandings. Sylvania Electric, 198 Ct. Cl. at 126-28, 458 F.2d at 1005-06. Since the flood definition clause is clear and unambiguous, there is no need for interpretation by the court.

Plaintiff's last major theory of recovery in this count is for reformation based on plaintiff's unilateral mistake, coupled with the defendant's inadvertent

misrepresentation. The court need not consider this issue as there was no showing of any misrepresentation on the part of the government intentionally or unintentionally by the plaintiff. "The equitable remedy of reformation to correct a unilateral mistake in a plaintiff's bid is available only 'if the government knew or should have known of a mistake in a bid costly to the bidder.'" Carrier Corporation v. United States, No. 534-83C, Slip Op. at 6 (Cl. Ct. Aug. 7, 1984) citing Burnett Electronics Laboratory, Inc., 202 Ct. Cl. 463, 472, 479 F.2d 1329, 1333 (1973). Furthermore, plaintiff's understanding of the ramifications of the flood-defining provision is shown by its adjustment in its bid price of approximately $60,000.00 when the provision was placed in the second Invitation to Bid. The balance of

plaintiff's theories in Count II, e.g., contractor's unilateral mistake coupled with defendant's misrepresentation and equitable adjustments for compensation for constructive changes are unsupported. Such a superficial representation of theories does not merit this court's attention.

Plaintiff also contends that the intention of Technical Provision Paragraph 7.4, the flood definition to ECI 7-671.3 is an unauthorized deviation. Plaintiff apparently believes that if the waters had reached a level greater than the level stated in the definition, the government would have urged the court to expunge the provision to prevent recovery. Plaintiff states that the court would then have to award the contractor reimbursement in quantum meruit. While it is not in the tradition of this court to deliberate over

such a hypothetical situation it can nevertheless be said that this conclusion, as drawn by counsel for plaintiff, is unfounded as well as unprofessional, moreover, it is of no consequence as the court finds that the agreed-upon insertion of a definition for the word "flood" in ECI 7-671.3 is not a deviation that requires approval in accordance with then ASPR 1-109. It is axiomatic that a collateral provision, such as Technical Provision Paragraph 7.4, is considered by this court to deviate another related clause when it modifies either the other clause or its prescribed application. In the present case the insertion of a

definition clause does not modify clause ECI 7-671.3 or its application. 8/ It merely defines a word that was previously undefined. By defining the word "flood" in the second Invitation for Bids and later the contract, defendant then had an objective standard, accepted by the contractor, by which an objective determination may be made of a generally subjective matter. Therefore, the court finds this definition an agreement between the parties to define a word which had previously been undefined by the ECI

8/ Since the court finds that the definition is not a deviation, there is no need to discuss the validity of plaintiff's application of the "Christian Doctrine", G.L. Christian and Associates v. United States, 160 Ct. Cl. 58, 312 F.2d 418, reh'g denied 160 Ct. Cl. 58, 320 F.2d 345, cert. denied 375 U.S. 954 (1963), thereby eliminating the need to determine the validity of plaintiff's alternative argument, application of ASPR 1-109, to the present case.

provisions and the contract, and is not an unauthorized deviation from ECI 7-671.3. The court finds for the defendant on count III.

CONCLUSION

The court accordingly grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment on Count III of its Complaint and the clerk of the court is ordered to dismiss the Complaint.

IT IS SO ORDERED.

MOODY R. TIDWELL
Judge

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2103

In the Supreme Court of the United States

OCTOBER TERM, 1986

UTILITY CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in rejecting its claim that, under its construction contract with the United States, the government was liable for the cost of repairing damage caused by heavy rainstorms that occurred during the construction process. In addition, petitioner asserts that under *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Claims Court lacked jurisdiction to entertain its contract action against the United States.

1. On February 16, 1978, after competitive bidding, the United States awarded petitioner a flood control contract to widen and lower the Joe Creek channel in Tulsa, Oklahoma (Pet. App. 4). The contract included two provisions that "place[d] the risk of loss for all pre-completion damage to permanent work on [petitioner] with the exception of damage caused by flood or earthquake" (Pet. App. 8).

Paragraph 12, the Permits and Responsibilities Clause, provided (Pet. App. 17 n.3):

> The Contractor shall, without additional expense to the Government, be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

The Damage to Work Clause confirmed the contractor's responsibility for pre-completion damage not "caused by flood or earthquake."[1] The contract defined "flood" as follows (Technical Provisions, Paragraph 7.4):

> (1) For the reach of the project extending from the upstream limit of the work to station 114+44, any flow exceeding a stage of 651.8 feet mean sea level at the upstream side * * *
>
> (2) For the reach of the project extending from station 114+44 to the downstream limit of the work, any flow exceeding a stage of 630.5 feet mean sea level at the downstream side * * *.

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[1]This clause provided, in pertinent part (Pet. App. 18 n.4):

> The responsibility for damage to any part of the permanent work shall be as set forth in the clause of the contract entitled "Permits and Responsibilities." However, if, in the judgment of the contracting officer, any part of the permanent work performed by the contractor is damaged by flood or earthquake, which damage is not due to the failure of the contractor to take reasonable precautions or to exercise sound engineering and construction practices in the conduct of the work, the contractor will make the repairs as ordered by the contracting officer and full compensation for such repairs will be made at the applicable contract unit . . . [or lump sum prices as fixed and established in the contract]. Except as herein provided, damage to all work (including temporary construction), utilities, materials, equipment, and plant shall be repaired to the satisfaction of the contracting officer at the contractor's expense, regardless of the cause of such damage.

On June 8, June 20, and July 7, 1979, prior to completion of the project, heavy rainstorms caused damage to some of the concrete work (Pet. App. 7). It is undisputed that at no time did the storms cause the water to exceed the "flood" level as defined in the contract (Pet. App. 10). Nevertheless, after the June 8 rainstorm, and again after each of the next two rainstorms, petitioner filed with the United States a claim for reimbursement of the costs of repairing the concrete (Pet. App. 10). The government's contracting officer rejected these claims (Pet. App. 13).

2. On August 20, 1982, petitioner filed this action in the United States Court of Claims. Petitioner admitted that the water damage did not result from a "flood" as defined in the contract (Pet. App. 21). It alleged, however, that the United States had impliedly warranted that its contract specifications for the project would prevent pre-completion rainfall damage of the kind that occurred. Petitioner also contended that the contract should be reformed in order to relieve petitioner of its responsibility for the water damage because the United States had "constructive superior knowledge" of weather conditions and a duty to apprise petitioner of that particular risk.

On April 22, 1984, the Claims Court granted summary judgment for the United States, and in a memorandum decision issued on January 21, 1986, the court of appeals for the Federal Circuit affirmed on the basis of the Claims Court opinion. The Claims Court ruled, first, that the contract unambiguously made petitioner responsible for any damage that occurred prior to its completion of the project, unless that damage was caused by earthquake or flood (Pet. App. 16-19). There was no allegation of earthquake damage, and petitioner admitted that the rainstorms did not cause a "flood" within the meaning of the contract (Pet. App. 19-21). The court therefore held that petitioner was "responsible for all the damage to the work in accordance

with the * * * specifications [of the contract]" (Pet. App. 21).

The court next rejected petitioner's contention that the United States had prescribed "design specifications" (Pet. App. 36) giving rise to an implied warranty: "Plaintiff had a duty as set forth in great detail in the contract to exercise its own judgment and experience. The contract is more like a performance contract than a design contract, because plaintiff had '* * * the responsibility for the means and methods selected to achieve the end result' " (Pet. App. 38 (citation omitted)). Accordingly, the specifications "do not implicitly warrant pre-completion * * * [performance] or successful end product" (Pet. App. 39).

The court also rejected petitioner's claim that the United States had engaged in "inadvertent misrepresentation" (Pet. App. 50-52). The court found that "there was no showing of any misrepresentation on the part of the government intentionally or unintentionally" (Pet. App. 51). In any event, the court observed, petitioner understood "the ramifications of the flood-defining provision, [as] * * * shown by [petitioner's] adjustment in its bid price of approximately $60,000.00" (Pet. App. 51).[2]

3. The fact-bound decision below is correct and is consistent with the decisions of this Court and of other courts of appeals. Further review is unwarranted.

a. The contract made petitioner responsible for pre-completion damage not resulting from an earthquake or flood. The rainstorms concededly did not cause a "flood" as defined. The courts below applied the plain terms of the contract and correctly held that the government was not responsible for the rainstorm damage. As this Court has

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[2]The court also rejected several other legal claims not presented in the petition (Pet. App. 43-50).

held, "[t]here is no reason to limit the ordinary meaning of words used in a contract by men prepared to invest under its terms" (*Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 592 (1938)). Accord, *Moran* v. *Prather*, 90 U.S. (23 Wall.) 492, 500-501 (1875); *Maryland* v. *Railroad Co.*, 89 U.S. (22 Wall.) 105, 111 (1874).

b. Petitioner contends, as it did below, that the United States impliedly warranted that the specifications furnished for the project would prevent pre-completion rainstorm damage. In support of that claim, petitioner cites this Court's decision in *United States* v. *Spearin*, 248 U.S. 132 (1918).

Petitioner misreads the *Spearin* case. There, the government contracted with the plaintiff for the construction of a dry-dock. The government furnished specifications that included detailed instructions for the reconstruction of a sewer. After plaintiff finished work on the sewer, but before it had completed the entire project, the sewer was destroyed by unexpected water pressure. Plaintiff sued the government, contending that the government was responsible for the resulting damage and this Court upheld plaintiff's claim. Ordinarily, the Court noted, "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered" (248 U.S. at 136). From this general principle, however, an exception is made where "the contractor is bound to build according to plans and specifications prepared by the owner" (*ibid.*). In that event, "the contractor will not be responsible for the consequences of defects in the plans and specifications" (*ibid.*). In *Spearin*, the Court held, "the sewer * * * was to be built in accordance with the plans and specifications furnished by the Government" (*ibid.*). Thus, while "[t]he risk of the existing system proving adequate might have rested upon [the contractor], if the contract for

the dry-dock had not contained the provision for relocation of the * * * sewer[,] * * * the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate" (*id.* at 137).

But only where "the government issues design specifications of a detailed nature" is there any basis to conclude that it has "warrant[ed] the sufficiency and efficacy of those specifications to produce the desired product in a satisfactory manner" (*Ordnance Research* v. *United States*, 609 F.2d 462, 479 (Ct.Cl. 1979)). Where, on the other hand, the government "explain[s] to potential builders what type of facility it wants and allow[s] the [contractor] to design [and] construct" the building (*Poorvu* v. *United States*, 420 F.2d 993, 999 (Ct.Cl. 1970)), no such warranty will be implied. The courts of appeals uniformly agree. See, *e.g.*, *Premier Elec. Constr. Co.* v. *United States*, 473 F.2d 1372 (7th Cir. 1973) (Stevens, C.J.) (holding that the additional costs to a contractor caused by an early thaw were not the responsibility of the government); *Koppers Co.* v. *United States*, 405 F.2d 554, 566 (Ct.Cl. 1968)(where "[t]he intricacies of how to produce the product and under what conditions * * * were left to [the contractor]" no design warranty arises).

In this case, the courts below correctly applied these settled principles, ruling that no warranty could have arisen because the government did not issue detailed design specifications but rather afforded petitioner considerable discretion in devising the appropriate method for carrying out its obligations. For example, with respect to concrete mixing, the courts noted that "at almost every step, the contractor was to use its own judgment and experience in deciding how, when, where, under what conditions, and which proportion would be best for which project section" (Pet. App. 38). Petitioner "had a duty as set forth in great detail in the contract to exercise its own judgment and experience"

(*ibid.*). Indeed, as the courts noted, petitioner itself "admit-[ted] there were three or four available construction procedures, * * * all of which were standard and fully acceptable" (*id.* at 33-34). The essentially factual conclusion that the contract specifications did not give rise to any implied warranty does not warrant review by this Court.[3]

c. Petitioner apparently also contends (Pet. 50-51) that the United States had "constructive superior knowledge" of hydrology and weather and made an "innocent misrepresentation" with respect to the threat of heavy rains. The Claims Court correctly found, however, that "plaintiff ha[d] access to the same principles and knowledge available to the defendant" (Pet. App. 45) and that there was "no showing of any misrepresentation on the part of the government" (Pet. App. 51). These findings also do not warrant further review.[4]

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[3]The ordinary rule is that a contractor is responsible for costs arising from unforeseen obstacles. See *Day* v. *United States*, 245 U.S. 159 (1917). In *Day*, a contractor was engaged by the United States to reinforce a canal in order to prevent future flooding. The contract expressly made the contractor liable for any damage to the work that occurred prior to completion. Before the work was completed, a flood rose above a bulkhead built by the government specifically to protect the work during construction. The contractor sought to hold the government responsible for the added costs occasioned by the flood. This Court rejected the contractor's claim. Writing for a unanimous Court, Justice Holmes noted that "[o]ne who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking" (245 U.S. at 161). "[W]hen the scope of the undertaking is fixed, * * * the contractor takes the risk of the obstacles" (*ibid.*). Because the "Government * * * had not guaranteed that the bulkhead should be sufficient" (*ibid.*), the Court refused to relieve the contractor of his agreed-upon responsibility for damages incurred during the construction process.

[4]See, *e.g.*, *Turnkey Enterprises, Inc.* v. *United States*, 597 F.2d 750, 754 (Ct.Cl. 1979)("Generally, the government * * * does not assume an obligation to compensate a contractor for additional costs or losses it

4. Finally, petitioner contends that under this Court's decision in *Northern Pipeline* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the jurisdiction of the Claims Court over breach of contract claims against the United States is unconstitutional. This contention, not raised below, is frivolous. The plurality in *Northern Pipeline* expressly recognized that Congress has the power to create "legislative courts" under Art. I to decide cases involving so-called "public rights" (458 U.S. at 67), plainly including disputes arising under government construction contracts. Cf. *id.* at 69 n.21 (noting that in *Williams* v. *United States*, 289 U.S. 553 (1933), the Court had held that the Court of Claims was a legislative court).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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incurs resulting solely from weather conditions, which neither party expected or could anticipate and not from any act or fault of the government").

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2103

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term 1986

UTILITY CONTRACTORS, INC.,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The argument set forth in the Memorandum of Opposition raises issues, which necessitates a Reply thereto.

1. On Design Warranty Questions

The Government's Memorandum does not mention the required transition section and filter material, the water velocities or other factors in this case. As with the Trial Court opinion, it barely mentions that the claim of Utility Contractors, Inc. ("Utility") is for damage to concrete. The Memorandum and the Trial Court opinion, by their omissions, vagueness, conclusory nature and language, seek to cast everything as if it were pure flood damage to non-concrete permanent work. Both sides in fact foresaw the latter damage, as to which the

contract provisions had risk-allocating effect.

In the same vein, the Memorandum (as the Trial Court opinion) engages in no discussion of facts or explanation of why the contractor should be held to greater knowledge and foresight as to effects of the design than the Government's own expert designers. Utility's experience included having performed over $200 million of public-contract heavy-construction work in its history since the 1950's, and it was performing $25 million per annum of such work in the peak 1979-1980 period (103-104). As Robert Kuhn testifies, Utility would have known if losses of concrete should be expected (88).

Utility has fully presented all its points at each juncture. The Trial Court itself initiated questions at oral

argument, on:

> (i) what the contract provisions were for (receiving answer that [as Weldon Gamel testified] they affected pure flood damage); and
>
> (ii) why the contractor hadn't asked questions about damage to concrete at pre-bid conference (receiving answer that [as Dennis Garrigues testified] when by chance one was asked, the Government's experts gave no information).[1]

Then the Trial Court omitted from its opinion its own sequence of inquiry.

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[1] (Official Transcripts of oral arguments of December 21, 1983 [pages 32-33] and August 29, 1984 [pages 29-31]). The Government's Memorandum (page 3) notes the Claims Court granted summary judgment on April 22, 1984. The actual date was April 1985, not 1984, as the Trial Court made a typographical error in the date of the Opinion when it filed it on April 22, 1985. The Government made its Motion for Summary Judgment on June 10, 1983.

Of course, if the contract provisions have the effect the Opinion contends as to damage to concrete, then it is self-contradictory to go on to consider whether the Contractor "should have known" about the losses of concrete.

While the Memorandum contends the Trial Court's decision is fact-bound, the opinion is actually extremely conclusory, without finding or stating facts, and in the few it names, takes evidence out of context and states it incorrectly. Among other examples, contrary to the opinion's assertion (8 Cl. Ct. 45-46; App. 11-13), (i) Utility implemented measures to prevent damage to concrete prior to the June 8, 1979 large loss, after a much smaller May 12, 1979 loss of concrete (96) and (ii) Mitchell testified about a design change to coarse-graded filter material, i.e., that it (and each of the

other changes he named) would have prevented damage to concrete, and was completely feasible. (143-144).

The Government's Memorandum, at page 3, asserts the Trial Court addressed Utility's theory of inadvertent misrepresentation. But the opinion mentioned it only on Count II of Plaintiff's Complaint, on the effect of the flood elevation (8 Cl. Ct. 53; App. 51) and not on Count I on the specifications for performing the work. Further, the opinion did not consider implied misrepresentation, i.e., arising from implication from incomplete information. For authority indicating the expansive nature of circumstances and indications which with omissions, make such implied, inadvertent misrepresentations, Utility cites Aerodex, Inc. v. United States, 417 F.2d 1361 (Ct. Cl. 1969).

The cases the Government Memorandum cites do not alter the authorities Utility has set out in its Petition for Certiorari, on its theories of breach of contract (and commercial impracticability), under its Count I.

2. On U.S. Claims Court

The Government's Opposition does not contest Utility's individual propositions, but is a curt general denial, as if to say that the issues are of minor importance, in the Supreme Court's workload. However, the cases in this area (especially on the status of the Court of Claims) are actually the largest, most central topic in the federal courts system per, e.g., the scheme of Hart and Wechsler The Federal Courts and the Federal System (1953) ("Hart").

Justice Sutherland's conclusion in Williams v. United States, 289 U.S. 553, 53 S. Ct. 751, 77 L.Ed. 1372 (1933) is that Article III judicial power extends only to cases in which the United States is party plaintiff or petitioner, i.e., so that thus the Court of Claims is a legislative court, not exercising judicial power under Article III. It is remarkable the Government has chosen to pick on this conclusion and case, as it has been overruled and is absolutely the most criticized in the area. The dissenting opinion in Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982) terms Justice Sutherland's conclusion "mystifying". Id., 73 L.Ed.2d 641. The plurality opinion (Justice Harlan) in Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L.Ed.2d 671, 694 (1962),

terms it outright "mistaken". Hart, at 237, characterizes the opinion as an "intellectual disaster". Utility submits that while the plurality in Northern Pipeline indeed cites Williams, the plurality's point is that Williams is just one chapter in the history of the legislative court-Article III court distinction.

Although Utility did not pose this constitutional question below, Glidden Co., supra, holds that a non-frivolous constitutional question on authority and composition of the court may be raised for the first time in the Supreme Court. In Glidden Co., petitioners also had not raised their objections below. Id., 8 L.Ed.2d 678-679.

In fact, according to the concurring and dissenting opinions in Northern Pipeline the present posture of Utility's

case will enable fuller consideration of the constitutional questions than in Northern Pipeline. Specifically, the concurring and dissenting opinions set out that there are two constitutional-issue objections, to-wit:

(i) that resolution of the proceeding may only be by an agency exercising federal judicial power under Const., Art. III (resulting, in Northern Pipeline, in invalidating 28 U.S.C. §1471 on its face, for violation of Article III); and

(ii) to exercise of a different authority conferred on the bankruptcy courts by the 1978 Act in resolution of the proceeding, i.e., (as the plurality held) as powers greater than the adjuncts approved in previous Supreme Court cases.

Northern Pipeline, 73 L.Ed.2d 627, 630-632, 634. The concurring opinion ruled only on the first objection, on

basis that decision of the second must await the exercise of such authority (i.e., which did not occur due to dismissal before disposition on the merits). The dissenting opinion also wrote that Defendant Marathon did not have standing to raise the second objection. In the instant case, as there has been an actual exercise of authority, with harm to Utility, the petitioner can (and does) pose both objections.

Further, writing on the first objection, the dissenting opinion in Northern Pipeline, also sets out that even on a public-rights matter, the Supreme Court will review (and may strike) removal of such matter to an Article I court or board.[2] Such review and striking is on

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[2] Tracing through the authorities, the dissent cites as primary basis for such striking, Murray's (contd. next page)

basis of weighing-balancing, considering Article III values, compelling legislative responsibilities, whether the removal is justified by necessity and Congress' evident reasons for removal. Northern Pipeline, 73 L.Ed.2d 638, 639, 642. The dissent writes further that important are (i) (toward upholding the validity of a legislative court) (a) presence of Article III appellate review and (b) that the subject matter is likely to be of little interest to the political branches--i.e., so as not to accumulate power and emasculate constitutional courts--and (ii) citing Palmore, supra

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2 (contd.) Lessee v. Hoboken Land & Improvement Co., 15 L.Ed. 372 (1856), Justice Vinson's dissenting opinion in National Ins. Co. v. Tidewater Co., 337 U.S. 582, 69 S. Ct. 1173, 93 L.Ed. 1556 (1949), Justice Harlan's plurality opinion in Glidden Co., supra and Palmore v. United States, 411 U.S. 389, 93 S. Ct. 1670, 36 L.Ed.2d 432 (1973).

(fn. 2), that Article III requirements are mandatory as laws of national applicability and concern are at stake. 73 L.Ed.2d 643-644.

Utility points out that in the past, the nexus for Congressional action has been just prescribing commissioners for rendering advisory opinions in the Court of Claims (an Article III court). See Glidden Co., supra, at 8 L.Ed. 2d 700 (fn. 36), citing 28 U.S.C. §2503, on such commissioners. In the instant case, Utility urges further the subject matter is of interest to a political bureaucracy, and is a long-time subject of the judicial branch and is of such national application. Therefore, even if Utility's claims were public rights matters, by Northern Pipeline dissent's weighing-balancing test they must be in an Article III trial court. The removal to

the Article I U.S. Claims Court must be stricken.

Further, Utility points out its action in the Court of Claims was not a cause that Congress created by its waiver of sovereign immunity, but rather a cause of action which Utility already possessed. United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580, 590 (1983); National Ins. Co. v. Tidewater Co., supra (fn. 2), at 93 L.Ed. 1568-1569, n. 22 (Justice Jackson's plurality opinion).[3] Citing this point, and criticizing Williams, Wright thus suggests that a case under the Tucker Act

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[3] In the same vein, the unanimous opinion in Atlas Roofing Co. v. Occup. Safety Comm'm., 430 U.S. 442, 97 S. Ct. 1261, 51 L.Ed.2d 464 (1977), defines that "public rights" situations are ". . . e.g., where the Government is involved . . . under . . . (a) statute creating enforceable public rights." Id., 477.

is a "case arising under the laws of the United States" under Article III. C. Wright, The Law of Federal Courts, p. 45, n. 32 (4th ed., 1983) ("Wright").

Wright also cites further factors (listed below, also noted by Justice Harlan's plurality opinion in Glidden Co.), indicating that such a case requires judicial power under Article III, rather than Article I legislative power. Wright, 45. These include the history of the Court of Claims and the type of litigation there, examining early Supreme Court cases prior to 1923, which showed the Supreme Court's opinion that the Court of Claims was vested with Article III judicial power. They include also that upon the United States' consent to suit, U.S. District Courts exercise Article III judicial power under:

(i) the Federal Tort Claims Act, §410(a), 60 Stat. 842, 843-844 (1946) as amended, 28 U.S.C. §1346(b); and

(ii) under the Tucker Act §2, 24 Stat. 505 (1887), as amended, 28 U.S.C. §1346(a)(2) in concurrent jurisdiction over Government contract suits when the amount in controversy is less than $10,000.

Wright, 45; Glidden Co., 8 L.Ed.2d 689, 694-696.

On the second objection, if the U.S. Claims Court is an adjunct (i.e., contrary to the holding of the plurality in Northern Pipeline) then Utility cites United States v. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L.Ed. 2d 424 (1980). The majority opinion there indicates that on such judge-made law as in the instant case (and in the absence of a consented-to referral), a permissible adjunct must be only a magistrate

analogous to a master or commissioner, i.e., of much lesser function and finality than a U.S. Claims Court judge. Id., 437-438. Accordingly, Utility poses both the Article III and 5th Amendment due process objections that Raddatz records are pertinent to an instance of an excessively-empowered adjunct.

Utility made its claim submission on December 5, 1980 and February 13, 1981 under the Contract Disputes Act of 1978 ("CDA"). (91) The Contracting Officer's Decision and Findings of Fact, denying such claims, was dated September 28, 1981. (91) Utility never consented to such Article I legislative court adjudication of its breach-of-contract theories (as fully stated in its claim and its Complaint). (7-26) United States v. Utah Constr. & Min. Co., 384 U.S. 394, 86 S. Ct. 1545 16 L.Ed. 2d 642

(1966) indicates sole basis for removing a claim under a Government contract from an Article III adjudicator, is the parties' consent under the contract disputes clause. Further, such consent is only for adjudication before administrative boards of agencies, of claims for equitable adjustments under contract clauses, i.e., and not such breach-of-contract claims. In addition, in this case, even if its claims had been solely for equitable adjustments, Utility took the opportunity afforded to revoke such consent, by submitting its claim under the CDA. See 41 U.S.C. Sec. 609(a) and Pub.L. 95-563, Sec. 16, 92 Stat. 2391, Sec. 16 (App. 61).

Contrary to the Government's position in its Opposition, the propriety of Article I courts and boards is a burning current issue for the Supreme Court.

Utility points to commentators' challenges (i) on constitutional grounds, (ii) on grounds of partiality and unfairness of Article I judges and agency board-members in favor of the Government, and (iii) that Article III status is necessary to attract the most highly qualified persons to serve as judges. Redish, Legislative Courts, Administrative Agencies and the Northern Pipeline Decision, 1983 DUKE L.J. 197 (1983); 1 Norton Bankruptcy Law and Practice Sec. 5.05 (Sept. 1985 Cum. Supp.), page 35.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On September 17, 1986, I served the above on the attorneys in said action, by placing three copies thereof in a sealed envelope with postage fully prepaid, in the United States Post Office mail box in Houston, Texas, addressed as follows:

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

_____
Peter J. O'Loughlin